IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 356 of 2007
In
COMPANY PETITION No. 292 of 1999
With
COMPANY APPLICATION No. 357 of 2007
In
COMPANY PETITION No. 249 of 1996
With
COMPANY APPLICATION No. 358 of 2007
In
COMPANY PETITION No. 60 of 1995
With
COMPANY APPLICATION No. 359 of 2007
In
COMPANY PETITION No. 128 of 1990
With
COMPANY APPLICATION No. 360 of 2007
In
COMPANY PETITION No. 205 of 1996
With
COMPANY APPLICATION No. 361 of 2007
In
COMPANY PETITION No. 157 of 1995
With
COMPANY APPLICATION No. 362 of 2007
In
COMPANY PETITION No. 152 of 1995
With
COMPANY APPLICATION No. 363 of 2007
In
COMPANY PETITION No. 72 of 1998
With
COMPANY APPLICATION No. 364 of 2007
In
COMPANY PETITION No. 66 of 1988
With
COMPANY APPLICATION No. 365 of 2007
In
COMPANY PETITION No. 29 of 1997
With
COMPANY APPLICATION No. 366 of 2007
In
COMPANY PETITION No. 41 of 2001
With
COMPANY APPLICATION No. 367 of 2007
In
COMPANY PETITION No. 358 of 1997
With

COMPANY APPLICATION No. 368 of 2007
In
COMPANY PETITION No. 220 of 2001
With
COMPANY APPLICATION No. 369 of 2007
In
COMPANY PETITION No. 277 of 2000
With
COMPANY APPLICATION No. 370 of 2007
In
COMPANY PETITION No. 289 of 1997
With
COMPANY APPLICATION No. 371 of 2007
In
COMPANY PETITION No. 227 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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EMPLOYEES' PROVIDENT FUND ORGANIZATION - Applicant(s)
Versus
O.L. OF ANJALI COATING PVT. LTD. - Respondent(s)

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Appearance :
MS HINA DESAI for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 05/09/2007

ORAL JUDGMENT

1. In all the applications the prayer by the

Employees Provident Fund Organization functioning under the Employees Provident Fund and Miscellaneous Provisions Act 1952 (hereinafter referred to as “the EPF Act”) is to direct the O.L. to realise the amount, which are mentioned in the separate application by different figures towards the statutory amount of provident fund of the workers. The priority claimed is above the secured creditors under Section 529-A of the Companies Act (hereinafter referred to as “the Act”)to or in any case under Section 529-A contending that it was the contribution deducted from the workers wages and not deposited with the Provident Fund Authority.

2. Heard Ms. Hina Desai learned Counsel appearing for the applicant - Provident Fund Authority in all the applications and Mr. Yadav for O.L. upon the advance copy.

3. In all fairness as such the Provident Fund Authority ought to have drawn attention of this Court by bringing on record the order passed by this Court dated 31.08.2005 in Company Application No. 195 of 2005 in case of Regional

Provident Commissioner-I vs M.A. Kuvadia, O.L. and others, which is decided after the reference opined by the Division Bench of this Court on the very issueS and the points which are raised in the present applications. The pertinent aspect is that in the said decision Regional Provident Commissioner-I, was also party. The present application is preferred by the Assistant Provident Fund Commissioner working in the Regional Provident Fund office, at Vadodara.

4. It deserves to be recorded that all contentions which arise for consideration in the present applications as such are considered and covered by the said decision. This Court in the aforesaid decision in case of Regional Provident Commissioner-I (supra) observed at paragraph Nos. 7,8,9,10,11,12,13 and 14 as under:

"7. Section 11 of EPF Act reads as under:

"11.Priority of payment of contributions over other debts:*-[(1)] [Where any employer is adjudicated insolvent or, being a company, an order for for winding-up is made, the amount due-*

(a)from the employer in relation to [an establishment] to which any [Scheme or the Insurance Scheme] applies in respect of any contribution payable to the Fund [or as the case may be, the Insurance Fund] damages recoverable

under Sec.14-B, accumulations required to be transferred under sub-section (2) of Sec. 15 or any charges payable by him under any other provision of this Act or of any provision of the [Scheme or the Insurance Scheme]; or

(b) from the employer in relation to an exempted [establishment] in respect of any contribution to the [the provident fund or any insurance fund] (in so far as it relates to exempted employees), under the rules of [the provident fund or any insurance fund], [any contribution payable by him towards the [Pension] Fund under sub-section (6) of Sec. 17] damages recoverable under Sec. 14-B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under Sec.17, shall, where the liability therefore has accrued before the Order of adjudication or winding-up is made, be deemed to be included among the debts which under Sec. 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909), or under Sec. 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under (Sec. 530 of the Companies Act, 1956 (1 of 1956)] are to be paid in priority to all other debts in the distribution of the property of the insolvent or assets of the Company being wound-up, as the case may be."

8. As such for interpretation of Section 11(1) of the EPF Act, no further discussion may be required in view of the above referred decision of the Division Bench of this Court in Company Application No.216 of 1997 in Company Petition No.205 of 1996 and allied matters. Since the language of Section 94 of EPF Act as considered by the Division Bench at para 4 is in substance the same for giving priority to the claim of ESI contribution in the category of

payment contemplated under Section 530 of the Act. It may be recorded that at para 10 and 11, the observations of the Division Bench are as under:

"10. Section-530, Sub-section(1), clearly observes that in a winding up matter, subject to the provisions of Section-529(A), there shall be paid in priority to all other debts, dues of the Government, which are in the form of revenues, tax, etc. When Section-530 is made subordinate to Section-529(A), then, a Court is obliged to look into the material provisions as contained under Section-529(A). Section-529(A) clearly provides that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company, workmen's dues and debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section-529 pari passy with such dues, shall be paid in priority to all other debts.

11. Section-529(A) has been introduced in the year 1985. It starts with a non-obstante clause. It clearly provides that "notwithstanding anything contained in any other provision of the Act or any other law for the time being in force". A true understanding of Section-529(A) would make clear that the provisions of Section-529(A) shall override the provisions contained in Section-530. Not only this, the provisions contained in Section-529(A) shall override the provisions contained in the ESI Act because the ESI Act is an Act of 1948, while the amendment in the Companies Act has been made in the year 1985 and with the fullest knowledge that it was to override the provisions contained in Section-530. If Section-94 of the ESI Act and Section-530 of the Companies Act are made subordinate to Section-529(A), then,

Section-529(A) shall march over the rights of others to which the others are entitled either under the special laws or under Section-530 of the companies Act. A combined/conjoint reading of Section-529(A) of the Companies Act would make clear that in a matter of winding up, the workmen's dues and the debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to Sub-section (1)of Section-529(A) pari passu with such dues, shall be paid in priority to all other debts. If such dues and debts are paid in full and even thereafter, some money is left with the Official Liquidator for its distribution, then, such money can be distributed under Section-530 of the Companies Act. When such a situation crops up, the State Government or the Central Government of the Local Authority may file their claim before the learned Company Judge and at that point of time, they may say that in view of their preferential right, either under the Local Act or under Section-530 of the Companies Act, they be paid."

9. Thereafter, at para 15, it has been concluded qua third question as under:

"15. The third question referred for our answer is that the properties/assets of the Company, which have already been mortgaged or earmarked by the secured creditors and when the Company is in liquidation, whether the Liquidator would have that equity alone and whether the entire amount would be required to be paid to the secured creditors or the ESI Corporation would be entitled to priority over the said dues in this behalf.

In absence of Section-529(A), the answers certainly could be in favour of the ESI

Corporation. Since after introduction of Section-529(A) and amendment to Section-530 of the Companies Act, the legal position is changed. When the Official Liquidator acquires or possesses the securities mortgaged with the secured creditors, then, the Official Liquidator would be obliged to observe the provisions of Section-529(A) and Section-530 of the companies Act. The question of equity would not arise because in a case where the securities/properties/assets are not sufficient to discharge the liability of the creditors described under Section-529(A) of the Companies Act, the question of payment under Section-530 of the Act would not arise. Section-530 of the Companies Act would come into operation only after the liability under Section-529(A) is discharged and some money is still left."

10. Therefore, if the applicant is to press in service of Sub-section(1) of Section 11 of EPF Act, the same will be the position and the PF contribution may stand on the same priority as contemplated under Sub-section (1) of Section 11 over the other statutory dues to be considered under Section 530 of the Act.

11. The contention raised by claiming priority or for including the claim under Section 529A of the Act by taking support of Sub-Section(2) of Section 11 of the EPF Act deserves to be examined further. The perusal of Sub-Section (2) of Section 11 shows that the legislature has used the language "the amount so due shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts." The use of the words "deemed to

be the first charge", and the words "assets of the establishment", and the words "in priority to all other debts" may call for further scrutiny. It deserves to be recorded that the language used by the legislature is priority to all other debts and not the secured creditors/secured debts. In normal circumstances it may include the debts payable to the workmen but it is on account of the express provisions under Section 529A of the Act the workmen's dues are treated at par with the dues of the secured creditors. Therefore, the language "priority to all other debts" cannot be said to be inclusive of the secured creditors for which there is express provision made under Section 529A of the Act. In view of the use of the words by the legislature "shall be deemed to be the first charge on the assets of the establishment", the first charge has to be maintained, but such first charge shall be on the assets of the establishment. If any interest is created in the properties of a secured creditor, the secured creditor shall continue to hold the interest in such assets or the property of the company or establishment. After the realisation of the secured interest of secured creditor in the properties of the Company, the first charge by statutory deeming fiction may continue to hold good, but it cannot be read as allowing to march over the interest of the secured creditors. As observed earlier the workmen's dues would have also been in priority after the secured creditors' dues, but only in view of the express provisions of Section 529A of the Act, the priority for payment is treated at pari passu with the secured creditors. Therefore, the contention of Mr.Mehta that the express provision in the statute providing for the first charge on the

assets of the establishment would stand at par with the other secured creditors or would stand above the secured creditors as provided under Section 529A of the Act cannot be accepted.

12. Further, it deserves to be recorded that Sub-section(2) of Section 11 was brought into the statute book in the year 1973 by Act 40 of 1973 w.e.f. 1.11.1973 and at the relevant point of time, Section 529A was not there in the statute book in the Companies Act. Section 529A is inserted in the year 1985 by Act 35 of 1985. Therefore, when the legislature inserted Sub-section (2) of Section 11 of the Act, Section 529A was not in existence at all and, therefore, also it cannot be said that the claim which is covered by Sub-Section(2) of Section 11 would stand included in the category of the priority as provided under Section 529A of the Act and, therefore, the contention of Mr.Mehta deserves to be rejected to that extent.

13. As recorded hereinabove, after 1973, as Sub-section (2) is inserted in Section 11 of the EPF Act, and the provision is also made under Section 529A of the Act for giving treatment to the workmen's dues for payment pari passu with the secured creditors, any claim by the Provident Fund Commissioner in respect to the PF contribution, which is covered by the category under Section 11(2) of the EPF Act, as such would remain as the claim, until it is not made by the workmen under Section 529A of the Act. If the workmen have already claimed the dues of PF under Section 529A of the Act, the claim made by PF Authority for recovery of the Contribution of PF under Section 11(2) of the Act shall get reduced to that extent, since none can be allowed to claim the very payment twice.

14. However, if no such claim is made by the workmen concerned for payment under Section 529A and the claim as contemplated under Section 11(2) of the EPF Act is only to be enforced, then in that case after the satisfaction of the claim of the secured creditors, if any assets of the establishment remain for disbursement, the same can be traced for enforcing the first charge on the assets as per Sub-section(2) of Section 11 of the EPF Act by the Provident Fund Authority. If the dues are under Section 11(1) of the Act, then in that case, as observed earlier, it may march over other dues of the category provided under Section 530 of the Act. However, the dues as sought to be enforced as per Section 11(2) of EPF Act shall also over march the dues which are categorized and which may fall under Section 11(1) of EPF Act since by statutory fiction the first charge is created over the assets of the establishment. It will be for the O.L., to draw the attention of this Court at the relevant time when the amount is to be disbursed or distributed, but until that stage has reached, the prayer of the applicant to disburse the amount as claimed cannot be accepted."

5. Therefore, as per the view taken by this Court in the above referred decision, the following aspects are cleared:

1. Dues of the Provident Fund Authority fall in the category of the dues under section 530 of Act and it does not fall in the category of Section 529-A of the Act.
2. Such dues would not over march the dues

outstanding of the secured creditors and the workmen dues which are to be included under Section 529-A for peri passu payment at the time of disbursement.

3. If the provident fund dues are to be considered for as the outstanding wages of the workmen for the payment under section 529-A of the Act, the claim for such purpose is required to be lodged by the workmen concerned then only it can be included under section 529-A of the Act, but in such circumstances, the claim of the workmen for outstanding wages shall get reduced to the extent of the provident fund contribution claim under the category of Section 529-A of the Act.

4. If the Provident Fund Authority is to assert right as per the provisions of Employees Provident Funds Act, their dues under category would fall 530 of the Act but at the time when the payment is to be made under Section 530 of Act, the dues of the Provident Fund Authority shall over march in view of Section 11(2) of the EPF Act.

6. Learned Counsel for the applicant mainly relied upon decision of High Court of Kerala, copy whereof is produced at Annexure-C, wherein while considering the over riding effect of Securitization Act and Reconstruction of Financial Assets and Enforcement

of Security Interest Act, 2002 (hereinafter referred to as “the Securitisation Act”), the rights of the Provident Fund Authority over the secured assets are maintained. As such High Court of Kerala while considering the effect to the priority of the claim, did not consider the amendment under Section 529-A of the Act and the amendment under Section 11(2) of the EPF Act which was brought about in EPF by Act No. 40 of 1973 with the effect from 1.11.1973. Further, in any case the Division Bench of this Court upon reference made by the Single Bench of this Court decided the point otherwise and held that the dues of the Provident Fund Authority would fall in the category under section 530 of Act of statutory dues and therefore, the position of law laid down by Division Bench is otherwise. The very decision of the Division Bench is followed by this Court in the above referred decision in case of Regional Provident Commissioner-I (supra). Therefore, when there are binding decision of the Division Bench as well as the earlier decision of this Court in case of Regional Provident Commissioner-I (supra), I cannot agree with the view expressed by the Kerala High Court in the aforesaid decision, copy whereof is produced at Annexure-C.

7. As a matter of fact as observed earlier the decision of the Kerala High Court is dated 28.03.2005 whereas

the decision of the Division Bench of this Court in case of Regional Provident Commissioner-I (supra) is dated 31.08.2005, being later to decision of Kerala High Court and in all fairness the applicant being very or similar statutory authority functioning under EPF Act in Gujarat ought to have drawn attention of the Court and it could have known that so far as Gujarat High Court is concerned, if the priority is already laid down, the same is binding at least till it is reversed by any higher forum, but not a whisper is made in the present applications of the aforesaid decision of this Court in case of Regional Provident Commissioner-I(supra). In any event when the Division Bench of this Court and there is already the decision of this Court in case of Regional Provident Commissioner-I (supra), the decision of the Kerala High Court is of no help to the applicant.

8. Under the above circumstances, the relief as prayed for directing the O.L. to disburse the amount by giving priority over the claim of the secured creditors cannot be granted.

9. Learned Counsel for the applicant lastly contended that the information is not being provided by O.L. regarding the payment if any made to the workers and therefore, the O.L. may be directed to provide the information. It appears that if the information is

directed to be provided to the applicant regarding payment made to the secured creditors and/or to the workers, no serious prejudice will be caused. Therefore, it is observed and directed the O.L. shall provide the information regarding payment made out of the money realised from the concerned company in liquidation within a period of six weeks from today.

10. Hence, subject to the aforesaid observation to provide information, the present applications are dismissed.

(JAYANT PATEL, J.)

Suresh*